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LOGIC v. COMMON SENSE IN PLEADING

The Necessity of Fact-Pleading

MICHIGAN'S experiment in pleading—or the suppression of pleading—is being carefully watched throughout the country. Not that it is likely that many other states will go to the extreme, for it is an extreme, of substituting notice-pleading for essential-fact-pleading: but it is a fact that even the code states are experiencing a reaction in that general direction. It will probably lead to a multiplication of their "short forms," rather than to a sweeping provision that

> "no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend."[1]

It is not entirely that they are unable to perceive the advantage of such freedom. Many of them have had long experiences with formless pleadings in municipal courts (from one of the greatest of which this very idea is taken) and in the courts of justices of the peace that preceded them. In criminal law they have, of course, been accustomed to the most general of general issues, one having the exact effect of the new Michigan general issue in civil actions, "a demand by the defendant of a trial of the matters set forth in the plaintiff's declaration."[2] In procedure before quasi-judicial commissions they are becoming accustomed to various degrees of informality. Yet they have not taken kindly to the abolition of essential-fact-pleading in ordinary civil cases.[3]

The reason is not a mere love of perversity. A provision for some kind of fact-pleading seems essential. That is, the functions that have heretofore been served by fact-pleading in Anglo-American law must still be served somehow. We may postpone the process to the time of the trial; we may simplify it to the highest degree; we may leave it to be implied by the lawyers and the Court on the basis of their general knowledge: but somewhere, somehow, we must frame an issue in every dispute before the dispute can be decided.

That the framing of an issue is the only function served by pleadings, I do not maintain. Pleadings have been used as a repository

[1] The Judicature Act of 1915, ch. xiv, § 2, based on Rule 15 of the Chicago Municipal Court.

[2] *Ibid*, § 11.

[3] Clarke Butler Whittier, Notice Pleading, 31 Harvard Law Review, 501.

of evidence. They have been relied upon for the purpose of giving notice to an adversary of that on which he must be prepared at the time of trial. They have served the purpose of permanent and official records of matters adjudicated or at least of summaries of that which happens from day to day in the courts. Incidentally, they have from time to time become the embodiment of the substantive law and have served the function of digests or codes, reversing the maxim "no right without a remedy," so as to limit one's rights by reference to his remedies. Under our jury system they have served the legitimate function of distinguishing between issues of fact and issues of law, and the questionable function of taking as many cases as possible away from the jury. At the same time, pleadings have served some less desirable purposes: they have developed technicalities that have tended from time to time to encumber the administration of justice, or to thwart it, and they have served their part in the preservation of the monopoly in the handling of litigation for men of special training. Yet we should hardly lay down any of these secondary functions today as the ultimate purpose of pleading, any more than we should its incidental effect—to terrify freshmen. Still if anyone insists that the framing of an issue is not the all important aim of pleading, and urges the shaping of the future of pleading on the basis of any other function,[4] I shall not quarrel with him provided he can give me a better name for whatever does serve this necessary function, which, at least in the common law of England and America, has been served and is being served by written statements of the essential facts on which a claim or a defense depends.

Two Ideals of Pleading—In Theory

If we grant, however grudgingly, that some scheme of pleading, in this old sense, some mechanism by which an issue may be framed, is necessary, we still have a wide latitude of choice among devices offered to us, on the one hand by logic and on the other by common sense.

[4] I am aware of a tendency, especially in Michigan, to regard the giving of notice as the most important function of pleading. "The purpose of pleading," says a Michigan court, "is to enable the defendant to prepare his defense." Malloy v. Grand Trunk Ry. Co., 158 N. W. 854, 855. *Cf.* Edson R. Sunderland in 14 Michigan Law Review 552, where the distinction between the notice-giving and issue-framing functions is recognized. Professor Whittier has declared (4 Illinois Law Review 178) and Dean Pound has quoted with approval (*ib.* 495): "The chief object of pleading [is] to notify the parties respectively of the claims or defenses which will be advanced by their opponents and attempted to be proved at the trial." It is suggested, with deference, that while procedural reform based on this principle may be timely, for reasons stated below, the principle itself cannot be accepted without qualifications as to time and place.

There is a tendency today to minimize the importance of the logic element and to emphasize the common sense of the situation and possibly to go to extremes in the name of common sense. The Michigan experiment, I believe, is but one of many manifestations of this tendency. It is not limited to the ranks of the lawyers who have become sated with the idiosyncrasies of a rigid set of rules. There is little doubt as to how a group of intelligent laymen would react to the following questions (I have tried them on freshmen): Should a man's *theory* of his case be tried or should a decision be rendered on the merits? On the merits, of course. Should his words be interpreted strictly against him or liberally, so as to do substantial justice between the parties? This question is hardly worth answering. Should the pleadings control the evidence or should the evidence be made the basis of a shaping or reshaping of the pleadings? It is an insult to the intelligence of the twentieth century to suggest that pleadings should keep out essential facts, for the presentation of which they are only as a means to an end. Should ordinary and concise language be the ideal of the pleader, or should words of art be carefully used and required in appropriate places? Words of art are, of course, consigned to perdition along with the Latin of the physician's prescription. Should a man be compelled to classify his case, and to proceed in accordance with the rules recognized in cases of a particular class, or should he leave the process to the tribunal and run no risk of selecting the wrong weapon from the arsenal of the law? Classification is but the shell of the law of yesterday—the living law of today must cast it off if it is to grow. If a man really has two possible defenses or two possible theories on either of which he may succeed, shall he be forced to choose one at the outset and stand or fall by it? Full justice, of course, requires the ventilation of every possible theory. In short, the ideal of common sense in pleading needs no recommendation, at least as matters now stand.

A little cross-examination, however, may check some of the testimony of our lay-witnesses. Would they go so far as to force a man without any previous notice to prove in court a matter that had not been questioned in the pleadings? Hardly—some arrangement must be made to avoid that extreme. Would they encourage "sloppy" pleading, bearing in mind how easily that may be degenerated into tricky pleading? Of course not. On the whole, are not certainty and directness to be preferred to obscurity and prolixity in pleading? Yes, provided the price paid is not too high. Would they permit a man who had used a technical expression as a weapon to hide behind a "Pickwickian sense" when he finds that technicality working out to his own disadvantage? That, of course, would be unfair. In

view of the complicated nature of human relations, aren't technical expressions, words of art, quite necessary for the purpose of exact definition of issues? Certainly. We should hardly write a treatise on chemistry without technical terms—why then a presentation of human relations? Surely a man who wishes to make use of the public courts either for offense or defense ought to be held to a strict accountability with reference to the court's time. Why shouldn't he be expected to find out in advance exactly what he wants and on what basis he claims it? Undoubtedly there is much to be said in favor of such a demand, but the question of how strictly one should be limited to the theory he selects, is a question of degree.

The Two Ideals in History

Thus gradually the case against the non-logical ideal may be weakened though by no means broken down. At least, there are two sides to the case. There are two ideals—constantly struggling with each other, yielding now an inch on this side and now an inch on that, but neither beaten in the contest. In the light of this struggle the whole history of pleading, at least in Anglo-American law, may be reinterpreted. It then becomes an intelligible and even a fascinating account of two tendencies in human nature; a spirit is breathed into the dry rules of pleading and they live.

The conflict between these two ideals, logic and common sense, between certainty and justice, is old—very old. It is not limited to Anglo-American law. Its universality and continuity have frequently been observed, but generally only to illustrate a single line of development, the gradual emancipation of substantive law from the shackles of adjective law. The extent of this emancipation in any particular society is therefore taken as a reliable measure of its progress. In fact, what I have here called the struggle between two ideals becomes the struggle of but one ideal against the forces of darkness, and the history of enlightenment becomes a history of the triumph of substance over form. The idea has been common since the days of Sir Henry Maine.

> "So great," says he, "is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of Procedure."[5]

[5] Early Law and Custom, 389. The same idea is expressed in Early History of Institutions, 252. Cf. Holmes, The Common Law, 253: "Whenever we trace a legal doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source."

In general, we are told, "legal technicality is a disease not of old age, but of the infancy of societies." In a very general way this theory is borne out by a comparison of mediæval and modern procedure. In early law it was fatal to a man's case to fail to "defend the words which ought to be defended." Such substantive law as has come down to us from early times has been preserved by clinging to parts of adjective law for dear life. No doubt the subsequent history of the law of rights has been greatly affected by the nature of the procedural law to which it is attached. Still it is going a little too far to suppose that in the first instance rights were created by remedies. At most procedure may have hardened custom into law, but the relations presupposed in the customs are human relations, made not in the courts but in every-day life. Crystallized codes of procedure are the results of a process of development just as crystallized rules of substantive law are, and in the process of their development they are influenced by the substantive law perhaps even more than the substantive law is influenced by them. Remedies may become defined and crystallized more quickly than rights, and may then exercise a retarding influence on the development of rights.[6] Yet too much has been said of late about the formative influence of procedure and not enough about the manner in which procedure reflects and is subservient to the substantive law of the times.

The simplicity of the old explanation of a continuous progress from adjective to substantive law is alluring—but it is a will-of-the-wisp. It is really futile to try to determine whether the formality of early law preceded substantive notions, or whether they themselves were preceded by a substratum of informal law. This much is clear: human nature, on its intellectual side has driven us to formality, the instrument of logic and certainty, and inertia has frequently kept us going in that direction beyond the point approved by common sense. The evil has generally brought with it its own remedy. A reaction has set in, in which another side of human nature has revolted against the dictates of formal logic. At a certain point the reaction itself is checked and a development in the opposite direction is begun again.

One may wonder how, in a matter requiring the highest mental capacities, a depreciation of logic can be tolerated at any time. Yet such is the case not only in pleading but also in other branches of the law. Take that remarkable volume of ultra-modern essays on

[6] Charles McGuffey Hepburn, Historical Development of Code Pleading in America and England, 31.

The Science of Legal Method,[7] and consider the impression it has made on the mind of a logician.

> "What strikes a logician as most curious is that this movement of challenge and reconstruction should take the form of an attack on 'logic.' There is surely a strange paradox here, is there not? * * * Gény recommends the lawyer to realize that the elements of every system of positive law 'are not logical entities, but those ethical and economic realities which alone can give us an insight into the effective forces of social life' (page 42). Ehrlich, after his fashion, is refreshingly vigorous: 'Of all the gifts of the human intellect, logical acumen is the least fruitful. There is profound wisdom in the fact that German legend frequently portrays the devil as a sharp dialectician' (page 84). Gmelin inveighs against those who 'care everything for formal logic and nothing for the sense of justice' (page 140). Kiss contrasts the Roman idea of 'aequitas' which kept the interpretation of the law plastic, with the 'degenerate' scholastic application of it by 'formal dialectic logic' (page 154 et seq.). Berolzheimer calls for emancipation from 'the letter of the law' (page 167). Such an authority as Dean Pound decalres 'application of law must involve not logic merely but a measure of discretion as well,' and he adds that the law cannot be made 'purely mechanical in its operation' (page 208). Wurzel records the appearance at the present time of the postulate that juridical thinking is 'to have even the courage of being illogical' (page 297)."

And so in pleading, too, there appears at this particular time a desire to get away from logical formulæ. It must not be supposed, however, that this is the first time in the history of mankind that vent has been given to such feelings as these. The entire modern history of pleading, between the Year Books and the modern codes, has been filled with a struggle to tone down the harshnesses of that rigidly logical system that grew up in the Year Books. In the realm of substantive law this attitude produced Equity. In pleading it produced various devices by which, illogically to be sure, a pleader was permitted to put more than one point in issue. That is the historical significance of the General Issue and the Replication *de injuria*—and numerous other deviations from the strictly logical plan of mediæval pleading. Indeed many of the most difficult, most

[7] Modern Legal Philosophy Series, Volume 9, Boston, 1917. I quote below from the remarkable review by R. F. Alfred Hoernlé, in 31 Harvard Law Review 807.

unreasonable, most technical provisions that have made a chimera of common law pleading are these very concessions to common sense. In the beginning of the nineteenth century the most marked defect in common law pleading was not its injustice but its irregularity, not its narrowness but its cumbersomeness, not its strictness but its uncertainty. As I read the Hilary Rules of the fourth year of William IV, it seems that what the judges were attempting to accomplish by virtue of the authority vested in them by Parliament, was to sweep away these irregularities, to simplify, codify, and make certain the rules to be followed by the pleader. On this side of the Atlantic the same desire for certainty was at least one of the elements in the complex mass of motives that made for pleading reform. Simplification was the keynote both of codification and of the other modifications to which common law pleading was subjected. It is true there was also a desire to prevent the miscarriage of justice that technical pleading had so often produced. But this last motive was probably stronger among the people than in the profession itself. The consequence has been that the courts have generally construed the code as a reënactment of so much of common law pleading as was not absolutely inconsistent with its terms. In course of time the codes have been interpreted and reinterpreted—as all codes are. Every word has been subjected to the process of glossation. Logical conclusions have been spun from the very commas in the code so that today in the code states logic seems to have the upper hand in the contest with common sense. The popular desire, always on the side of common sense, seems however to be winning over professional opinion as a reaction—and this, rather than the success of the squire's court's methods, is the explanation of the attempt today to do away with all fact-pleading.

The True Significance of the Present Trend

The situation is exactly like that which develops in the history of codes in other branches of law.[8] Constitutional law, for example, the first part of our law to be codified in this country, has gone through a period of verbal interpretation that seems to be passing

[8] I have traced this post-mortem history of codes in several connections in 65 University of Pennsylvania Law Review 665, 31 Harvard Law Review 373, 27 Yale Law Journal 31. A close parallel could be drawn in the history of pleading showing alternations between periods of strict law and periods of equity, with the several transitional stages. It is enough for our present purposes, however, to note that Anglo-American pleadings have twice in history been reduced to something like a rigid code, sufficiently definite in letter to make the spirit secondary. The first we may date sometime in the 1400s, perhaps a generation or two before the publication of the *Liber Intrationum*, 1510. The other is the period of revisions and codes about the middle of the nineteenth century.

away before a new spirit of realism. The newer codes, on the other hand, are just entering into their periods of word quibbles. The decisions, for example, on the Negotiable Instruments and the Sales codes have degenerated in the last few years into quarrels as to whether the word "value" means one thing or another in a certain place, and whether the back of an instrument is really the back of it. In passing, it may be encouraging to remember that this is but a transitory phase of statutory interpretation, and that we may hope in course of time for a reaction against this particular kind of logic in these fields.

When the reaction finally sets in there is apt to be a feeling on the part of those who take part in it that they are really independent of the narrow past. As a matter of fact, the habits of thinking formed in that narrow past are not so easily shaken off. We are just beginning to learn how much of the equity of the chancellors was really a reflection of the strict law of earlier times. Equity follows the law in more senses than one. In like manner those who today declare their independence of ancient rules of pleading may be enabled to do so largely by reason of the general habit of implying what that older pleading had expressed. Here, I believe, we have a true explanation of the success in Michigan at the present day of notice-pleading, a system by the way for which Michigan courts had prepared the way before the adoption of the Judicature Act of 1915. We must remember that those little names of types of cases, "assumpsit," "trespass on the case," and so on, tell us a great part of a man's story. If a code-state were to try notice-pleading, it would soon find itself handicapped by the lack of them. As matters stand the defendant, the judge, the jury, the lawyers, everybody knows by implication, what is meant when a traction company is sued by an injured pedestrian for damages. They know that negligence is the basis of the alleged liability, and they know, as a matter of fact, almost everything that goes to make up the average case of this variety. In like manner in all of the commonest forms of cases that fill our courts, a little imagination is sufficient to enable us to supply, out of our experience with past cases, the framework of the entire transaction. But there are also unusual cases, and those that are usual today may be less usual as civilization progresses and life changes. The very same considerations that have made it necessary to struggle away from the fixed forms of pleading of the past will surely make it necessary to do something to fill in the gaps of a system of pleading which is adequate for today only, because based on implications which we inherit from the immediate past and which are valid for only the peculiar facts of today.

In one sense a system of pleading is to be judged solely by its usefulness for the time being. It is a means to an end. When the need arrives, the advocates of notice-pleading may tell us, a more elaborate pleading can easily be developed. "The forms of declaration now in common use" may still be employed.[9] But it is all a question of degree. To what extent is it desirable—or even safe—to conceal or deny the process of the framing of an issue? To what extent should be deliberately worked out before the trial; to what extent should it be left to the judge at the trial or after the trial?[10] There is a danger line somewhere, and the further we go beyond it, the more violent will be the reaction, in the opposite direction.

The Crux of the Matter—Common Sense and Judicial Freedom

Whether desirable or not it is hardly likely that experimentation in the neighborhood of the danger line will be permitted to the courts in many of our states. There is a practical consideration that seems likely to cut short the career of common sense in pleading long before the danger line is reached in this country. It is the jealousy of the power of officers that inheres in a democratic government. In the final analysis the common sense ideal is inextricably interwoven with the extension of the discretion of the court, especially the trial court. Distrust of courts on the other hand, on the part of our legislatures not only gives proceedings in error their lease on life, but also becomes the fountain head of mechanical legislative rules that must be mechanically applied. It may be good to talk about a freer interpretation of the law by the courts—they will

[9] Judicature Act of 1915, ch. xiv, § 2.

[10] Is a judgment based on factless pleadings entitled to "full faith and credit" under the Constitution of the United States, in a sister state? In passing on foreign judgments it has frequently been held that to constitute a judgment there must be pleadings, monition and a hearing. (Sawyer v. Insurance Co., 12 Mass. 291 and other cases in Beale's *Cases in Conflict of Laws*, III, 294 ff.) Executive judgments, judgments by commissions, entries to which a statute gives the effect of judgments, and similar near-judgments are, of course, not included in the purview of this constitutional clause. (Foote v. Newell, 29 Mo. 400; Nouvion v. Freeman, 15 App. Cases 1.) That a similar weakness inheres in judgments where too much freedom is allowed in the shaping and reshaping of issues at and after the trial, is illustrated in Reynolds v. Stockton, 140 U. S. 254. There Brewer, J., speaking for the court says: "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. * * * When a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state."

soon enough be reminded that freedom in interpretation is a violation of their oath of office. "What the professors coolly propose to the judges" says an irate practitioner, "is the commission of impeachable offenses."[11] This is the crux of the matter: Legislatures must learn that only in so far as they are willing to give a wide range of discretion to trial courts, can logic be made to yield to common sense in pleading. If they have the will to do it the means can easily be found. An infusion of common sense into pleading may come by granting or confirming a free rule-making power in the courts as has been done in England.[12] It may come through such legislation as we are getting in some of the code states to prevent reviews and reversals in higher courts on pleading questions.[13] It may come through a withdrawal by act of the legislature of all formal requirements in pleadings—or through a combination of all of these plans as in Michigan. But it cannot come any more rapidly or thoroughly or endure more permanently than the emancipation of the judiciary from the jealousy of the legislature even in an age when the tendency is all towards the reign of common sense.

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[11] John Maxey Zane, in 16 Michigan Law Review, 309.

[12] I need hardly refer to the Studies in English Civil Procedure by Samuel Rosenbaum in 63 University of Pennsylvania Law Review, or his book, The Rule Making Authority in the English Supreme Court, 1917.

[13] The American codes contained a provision to that effect. Thus: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed, or affected, by reason of such error or defect." (§ 138 of the code as adopted in Ohio, 1853). This was one of the sections that fared badly at the hands of the courts. All errors were presumed to be prejudicial. In 1911 Ohio added to this section of the code the following language: "In the judgment of any reviewing court upon any petition in error in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings, and judgment under review. In case such reviewing court shall determine and certify that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reveiwing court a modification thereof will do more complete justice to the party complaining. In case such reviewing court shall determine and certify that in its opinion substantial justice has not been done to the party complaining as shown by the record such reviewing court shall proceed as provided in Section 12272 of the General Code." (General Code, Section 11364.)

That there is a tendency now to respect the spirit of this provision may be seen in almost any volume of the recent decisions of a code state. For example, refusals to grant reversals for errors on the ground that they are not prejudicial are recorded in 87 Ohio State at pages 401, 460, 477 and 479.